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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. [redacted] 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 1109

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF OF PETITIONER

Opinion

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 99 Ariz. 161, 407 P.2d 747 (1965), and reprinted R. 33.

Jurisdiction

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a civil case. The decision of the Supreme Court of Arizona was filed on November 12, 1965 (R. 34), and rehearing was denied on December 14, 1965 (R. 56). A petition for certiorari was granted on May 2, 1966, the case being placed on the summary calendar (R. 57). At issue is whether Arizona may permit lands granted to the State of Arizona in

trust for the benefit of the public schools and other designated public purposes under the New Mexico-Arizona Enabling Act, 36 Stat. 557, 568-79 (1910), as amended, to be taken by the State Highway Department for rights of way and material sites, without compensation. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

Statute Involved

The statutory provisions involved are first, the congressional provisions, Sec. 20, Ninth, and Secs. 24-28 of the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, 572-75, as amended. The statute is set forth in Appendix A and the essential language of Sec. 28 is as follows:

> "[A]ll lands hereby granted . . . shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . . .
>
> "Disposition of any said lands . . . for any object other than for which such particular lands . . . were granted or confirmed . . . shall be deemed a breach of trust . . . .
>
> "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void. . . . . . .
>
> "Nothing herein contained shall be taken as in limitation of the power of the State or any citizen thereof to enforce the provisions of this Act."

Sec. 20, Ninth, is as follows:

> "Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

"All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress."

Second, the state provisions, Article X, Sections 1 and 2 of the Arizona Constitution, 1 A.R.S. p. 154, are as follows:

"§1. Acceptance and holding of lands by state in trust

Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"§2. Unauthorized disposition of land or proceeds as breach of trust

Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust."

Question Presented

Whether the decision of the Arizona Supreme Court permitting public lands that have been granted to the State of Arizona in trust under the New Mexico-Arizona Enabling Act 36 Stat. 557 (1910), as amended, for specified public purposes, to be taken by the state highway department for highway

rights-of-way and material sites without compensation of the trust, violates the terms of that act.

Statement

A. *The Statute and Its Background.*

It has been the national policy ever since the Northwest Ordinance of 1787 that Congress, in control of the public domain, has by compact with the territories and newly admitted states encouraged and fostered the development of education within them.[1]

This policy in the late 19th century took the usual form of a provision in each state enabling act that the proceeds of the sale of designated public lands were reserved for specified public purposes, primarily educational. These lands were to be sold at some minimum price and the proceeds held in trust for those purposes. Typical of this type of legislation is the act admitting North Dakota and Montana,[2] two of the amici here; and this was commonly construed as amounting to a trust of the land itself. See, e.g., *State Highway Comm'n v. State,* 70 N.D. 673, 297 N.W. 194 (1941); *State ex rel. Galen v. District Court,* 42 Mont. 105, 112 Pac. 706 (1910).

When the time came to admit New Mexico and Arizona a few years later, there had been recent scandals concerning land sales which made the Congress consider legislation that would provide even more specific and greater protection of the public

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[1] Sec. 14 (Article III) of the Northwest Ordinance of 1787 provided: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged . . ." Act of July 13, 1787, Rev. Stat. at p. 15, (2d ed. 1878).

[2] See Act of Feb. 22, 1889, ch. 180, Sec. 11, 25 Stat. 679-80. See also the enabling acts of Utah, Act of July 16, 1894, ch. 138, Secs. 8-10, 28 Stat. 109-10, and Wyoming, Act of July 10, 1890, ch. 664, Secs. 4-5, 26 Stat. 222-23.

lands.[3] For this reason, although the Arizona-New Mexico Enabling Act passed the House with the traditional trust fund pattern,[4] when the act reached the Senate a substitute act went further and not merely put the funds from the sale of lands in trust but also expressly placed in trust the lands themselves. Details of the legislative history leading to this decision will be set forth in the argument protion of this brief. In summary, the statute (set forth in the "Statute Involved" section of this brief and in the Appendix) provided that the lands themselves "shall be by the said State held in trust"; every disposition of the lands for any purpose other than the trust purpose was declared to be "breach of trust." All sales, leases, conveyances, contracts "concerning any of the lands hereby granted or confirmed, or the use thereof" not in conformity with the statute were declared to be "null and void." By Section 20, Ninth, of the Enabling Act Arizona was expressly required to accept this trust as a condition of statehood and by Article X of its own Constitution, Arizona accepted the trust.

The purposes for which the lands were placed in trust were "for the support of common schools" and for a number of other

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[3] By the Act of June 21, 1898, ch. 489, 30 Stat. 484, extensive land grants were made to the Territory of New Mexico for supporting the common schools, erecting public buildings, and providing for a university and agricultural college. The sales and leases of these lands were to be made in a designated manner, and limitations were placed upon the amount of timber land that could be leased to any one person, corporation, or association. The territorial authorities violated these provisions with respect to the timber lands, and in 1908 the Department of Justice began several suits, known as the "tall timber" cases, against the offending parties. In 1908 a bill was introduced, and failed to pass, that would have ended those suits, and at the time the 1910 New Mexico-Arizona Enabling Act was considered by the Senate Committee on the Territories, these suits were still pending. See. Rep. No. 454, 61st Cong., 2d Sess. at 19-20 (1910); *Murphy v. State*, 54 Ariz. 338, 181 P.2d 336, 345 (1947).

[4] See H. R. Rep. No. 152, 61st Cong., 2d Sess. (1910); 45 Cong. Rec. 714 (1910). The text of the bill appears at 45 Cong. Rec. 702-05 (1910).

purposes;[5] and Sec. 28 prescribed that none of the lands should be sold or leased, "in whole or in part except to the highest and best bidder at public auction," and there was to be "no sale or other disposal" of the lands at less than an appraised value. All proceeds were to be duly protected.[6]

B. *Practice of Arizona, New Mexico, and Other States in Respect to Highways and Public Works.*

Questions have arisen under the New Mexico-Arizona Enabling Act and under the similar statutes in other jurisdictions as to whether trust lands may be taken for a miscellany of public uses, including highways, without compensation to the trust funds. Arizona, almost alone, has held that such lands may be taken without compensation.

1. *Arizona practice.*

In *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Arizona Supreme Court held that the Enabling Act did not prohibit the construction of a county highway across school lands since the Enabling Act did not limit the power of the

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[5] Other specific purposes provided in the statute are for: university purposes, legislative, executive, and judicial public buildings, penitentiaries, insane asylums, schools and asylums for the deaf, dumb, and blind, miners' hospitals, state charitable, penal and reformatory institutions, agricultural and mechanical colleges, school of mines, and payment of certain county bonds, with the remainder of lands and proceeds not used for these purposes to become a part of the permanent school fund. See Sec. 25 of the Enabling Act. Of the 10,790,000 acres granted to the State for all designated uses, over 9,180,000 acres are for various educational purposes. See Arizona State Land Commissioner, Annual Report 28 (1965).

[6] Congress amended the Enabling Act by the Act of June 2, 1951, ch. 120, 65 Stat. 51, (1951), in various ways broadening the leasing power to permit, for example, development of petroleum products without dealing directly with the matters involved in the instant case. The complications of the statute will be reserved for the argument portion of this brief. The amendment was passed at the request of the Arizona Legislature, which amended its state constitution to conform; 1 A.R.S. 155, 156. Other amendments are discussed in the argument portion of this brief.

legislature to authorize grants of right-of-way easements over public lands for public highways. In *State ex rel. Conway v. State Land Dep't*, 62 Ariz. 248, 156 P.2d 901 (1945), the State Land Commissioner was held not entitled to receive or collect payment for, and the Highway Department was not required to purchase or lease, school and institutional lands or their natural products used for establishment, construction, maintenance or repair of state highways. The Commissioner was required to issue, upon proper application, necessary permits to enable the Highway Department to perform its duties respecting the administration of state highways.[7]

The aggregate school lands in Arizona are in excess of 9,180,000 acres.[8] The acreage taken for material sites and state and federal highway purposes between 1956 and 1965 was 40,173.88 acres with a total estimated value of $9,892,700.17.[9] As the present case indicates, the demands so far made are, if the practice is permitted, only the beginning. As the record shows, the Highway Department's position is supported in the instant case by various utilities, water companies, and electrical districts

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[7] This latitudinarian attitude is not the usual Arizona approach, which is to protect the lands and their proceeds. Thus the Arizona court has also held that the legislature has no power to intermeddle with the duties of the state treasurer as trustee of the proceeds of sales of public lands, that the provisions of the Enabling Act are controlling as to the disposition of lands acquired on foreclosure, and that conveyances in any manner other than that provided by the Enabling Act are void. See *Murphy v. State*, 54 Ariz. 338, 181 P.2d 336 (1947). The opinion in that case carefully considered and applied the legislative history of the Act to conclude that severe restrictions on the disposition of trust lands were intended, and that those restrictions prevailed over any attempted relaxation of them by the legislature.

[8] See Arizona State Land Commissioner, Annual Report 28 (1965).

[9] This information has been obtained from the Arizona State Land Department. At the inception of the present case, the Land Commissioner compiled a survey of the value of all State trust lands, based upon the values of adjoining lands.

whose claims to similar privileges follow the Highway Department (R. 22-34).

On the other hand, the practice in Arizona of taking easements without compensation has not been uniform. Federal agencies have obtained rights-of-way for transmission lines across state trust lands and have compensated the state, based on the appraised value of the lands.[10] Various state agencies have also leased or purchased rights of way over trust lands.[11]

2. *New Mexico practice.*

The New Mexico practice under the identical federal statute is the exact opposite of that of Arizona; see *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), which expressly holds that the highway department may not make uncompensated use of trust lands. Under the New Mexico practice, "The New Mexico Land Office conveys such rights-of-way and material sites for so long as they are used for highway purposes. This is done without competitive bid and is compensated for at an appraised price. So far, this

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[10] The U.S. Bureau of Reclamation has taken a site for its Pinnacle Peak Microwave Station under Civil Action No. 5473-PHX; a right of way through Sections 9 and 10, T4N, R4E, under Civil action No. 4847-PHX; a transmission line from Four Corners to Phoenix under Civil Action No. 773-PHX; and a transmission line known as the Lake Mead-Liberty line. The Bureau of Indian Affairs has secured a transmission line and a substation in Pinal County. This information is taken from the records of the Arizona State Land Department and the civil action references are to dockets in the Federal District Court in Phoenix.

[11] The bases of these transactions have been lump sum rental, not subject to reappraisal (*e.g.*, certain Maricopa County Flood Control District, Graham County, and City of Flagstaff rights of way); sales at public auction (City of Tucson rights of way); rental paid annually (*e.g.*, City of Kingman, Pinal County Electrical Dist. No. 5, Mohave County Board of Supervisors); and ten years rental paid in advance (*e.g.*, Graham County Board of Supervisors, City of Kingman, Florence Area Watershed Flood Control District). These transactions are listed in the public records of the Arizona State Land Department.

compensation has been mutually agreed upon by the parties in each instance."[12]

3. *Practice in other states.*

The Arizona practice accords with the decision in *Ross v. Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3 (1924), but as the brief of Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming as amici curiae on the petition for certiorari shows, p. 4, this Wyoming decision does not in fact accord with the current Wyoming practice, which has recognized that the *Ross* decision does not apply to highways of the magnitude of state highways. Conflicts of the Arizona practice with decisions of other states were set forth in the petition for certiorari and in the amicus brief and will be more fully set forth in the argument section of this brief. Nebraska law expressly provides that school lands, if needed for highway purposes, shall be taken by eminent domain; Neb. Rev. Stat. Secs. 72-213,-221. For details of the mechanics, see Neb. Rev. Stat. Secs. 72-224.02,-224.03. South Dakota similarly provides for an appraisal and payment system; see, e.g., S.D. Code Sec. 28-0108 (Supp. 1960).

4. *Events leading to the instant litigation.*

In 1964, the State Land Commissioner, Arizona's officer charged with the administration and protection of public lands, issued a regulation,[13] under which highway rights-of-way and

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[12] Letter from Office of Commissioner of Public Lands of New Mexico to Arizona Special Assistant Attorney General July 5, 1966.

[13] The text of the regulation is:

"State and County highway Rights of Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122."

Proposed Regulation of
State Land Commissioner, Rule 12.
(R. 11-12)

material sites might be granted by the Land Department on the basis of appraisal and payment. The Arizona Highway Department, after administrative proceedings, filed an original proceeding in the Arizona Supreme Court to prohibit the Commissioner from enforcing the regulation. The Supreme Court of Arizona granted the writ of prohibition on the ground that the Enabling Act did not require payment for the taking of trust lands by the Highway Department. This petition for certiorari is taken from that decision.

In the Supreme Court of Arizona, the challenging party was the State Highway Department, supported by various public utilities which contended that they also were State governmental subdivisions; the defending party was the State Land Department.[14]

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[14] It will be observed that the contest is thus both in form and in very real substance between two different agencies of the State of Arizona, the Attorney General of the State being the common lawyer for both. Under Arizona law, the Attorney General, a county attorney, or a special counsel under the direction of the Attorney General represents the Land Department in actions relating to State lands, A.R.S. Sec. 37-102(C). The Attorney General also represents the Highway Department, A.R.S. Sec. 18-114. Where the interest of State agencies have collided, it has been held proper for the Attorney General, through his deputies, to represent both sides in the controversy; see *State ex rel. Conway v. Hunt*, 59 Ariz. 256, 126 P.2d 303, *rev'd on rehearing on other grounds*, 59 Ariz. 312, 127 P.2d 130 (1942), provided that he is acting within the statutory scope of his authority. See *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960). To insure that this is an absolutely adversary proceeding, the Attorney General has appointed Mr. John P. Frank, Mr. Paul G. Ulrich, and Mr. Dix W. Price as special counsel in this cause. In addition to being an attorney, Mr. Price is the Executive Secretary of the Arizona Education Association and Mr. Frank and Mr. Ulrich are compensated entirely in this matter by the Arizona Education Association. The defense of the trust lands, of which school lands comprise by far the largest portion, has thus been assigned in part to a completely independent teachers' organization of the State with a vital interest in the future of the schools. The Arizona Education Association is the professional association of fifteen thousand teachers and school administrators in the State, comprising eighty-five per cent of all Arizona educators. Throughout its history, the Associa-

(Footnote Continued)

The decision in the court below followed the earlier Arizona cases previously cited. The essence of the argument as advanced by that court at the present time is two-fold (R. 39-40):

(a) Giving lands for rights-of-way is not a "disposition" because what is taken is less than a fee estate.

(b) The court takes judicial notice that "good highways throughout a state increase the value of the lands." Since there is "overall benefit to school trust lands" by the building of highways, and since there are large tracts of trust lands left, the granting of rights-of-way and of material sites "are of material benefit to the trust lands as a whole, and enhance the value thereof." (R. 42).

This petition was duly taken as detailed in the jurisdictional statement of this brief.

Summary Of Argument

The court below has held that a state highway department may take school trust lands, granted to the state in trust under its enabling act by Congress, without compensation. The reasoning of the court below is synthesized by it in a sentence: "The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value." (R. 39-40).

This is error in each respect. These lands were given in trust, a trust that was accepted by the state. It is immaterial whether the right of way be regarded as a fee or an easement; the land is lost to the trust in either case, and the statute covers every

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tion has acted vigilantly to protect the public trust lands. As is developed in the text, strong exponents in the court below favoring the uncompensated taking of the trust lands are public utilities which anticipate extension of this privilege to themselves, see Ariz. Const. Art. XIII, Sec. 7; A.R.S. Sec. 45-938(C), further demonstrating the true adversary quality of these proceedings.

disposition "in whole or in part"; it covers not merely sales but any "other disposal"; it covers "the use" of the land. Under Arizona, as under general law, an easement is an interest in land.

The theory of the court below that the trust lands are "not deprived of anything of value" by the loss of what to date is 40,000 acres of land is based on the "benefit" or "advantage" theory that the resultant roads increase the value of the residual trust lands. But the Enabling Act does not authorize any such substitution, and this Court has expressly held that anticipated side benefits do not permit invasion of the trust lands without payment; *Ervien v. United States,* 251 U.S. 41, 40 Sup. Ct. 75, 64 L. Ed. 128 (1919). Under the rule of strict construction of government grants, in light of the strong legislative history, and in view of numerous decisions interpreting similar acts in other states, the decision and practice of Arizona which stand alone in the country, are simply wrong. For other decisions, see *State ex rel. State Highway Comm'n v. Walker,* 61 N.M. 374, 301 P.2d 317 (1956); *State ex rel. Galen v. District Court,* 42 Mont. 105, 112 Pac. 706 (1910); *State Highway Comm'n v. State,* 70 N.D. 673, 297 N.W. 194 (1941); *State ex rel. Ebke v. Board of Educ. Lands and Funds,* 154 Neb. 244, 47 N.W.2d 520 (1951), and *State ex rel. Johnson v. Central Neb. Pub. Power & Irr. Dist.,* 143 Neb. 153, 8 N.W. 2d 841 (1943). While the decision below accords with the theory of *Ross v. Trustees of Univ. of Wyoming,* 30 Wyo. 433, 222 Pac. 3 (1924), it conflicts with the practice of that state, since the decision has been construed to be limited to county highways that generally open up previously inaccessible lands.

In addition to the legislative history of this act, repeated acts of Congress either by way of amendment of this Enabling Act or by amendments to others, show that Congress has repeatedly interpreted its own trust legislation as covering less than fee interests and as requiring compensation for land taken — without regard to whether it is taken for a public use.

Petitioner, who by virtue of his office becomes the actual trustee for the school lands in Arizona, does not propose to make public development in the state impossible by locking up the trust lands; he merely asks that the trust be properly paid for the lands taken. For this purpose, he has issued a regulation applying the eminent domain procedures of Arizona to determine the value of lands to be taken. The propriety of such a system, which accords with the usual practice under these acts, warrants approval of his regulation and reversal of the court below.

Argument

I. *Introduction.*

The decision of the court below that school trust lands may be taken for highways without compensation rests on two fallacies. To say that putting a great interstate, multi-lane boulevarded highway across school lands is not a "disposition" because less than a fee is taken is to make an artificial and valueless distinction. To say that lands need not be paid for because some other lands will gain in value from an anticipated increase in prosperity of the state due to highway construction is to make a substitution of values which Congress has not permitted. Perhaps Congress might have enacted a law by which trust lands could be distributed in return for the anticipated joys of some future prosperity; but Congress required instead a cash in hand approach with such absolute precision that nothing else will do.

II. *For Present Purposes, the Distinction Between an Easement and a Fee Interest in the Public Lands is a Distinction without a Difference.*

The Arizona cases have assumed that somehow there is a profound legal difference for purposes of this statute between the taking of an easement, which a highway right-of-way is called in Arizona, and the taking of fee title as is the practice, for

example, in North Dakota. If there were any merit in such a distinction, it would make too much depend on form. If a super highway with tons of concrete lies upon the ground or excavations for materials are made, the use of land is just as total whether it is called an easement or a fee. The practical consequences are the same.

An easement, under Arizona law as elsewhere,[15] is an interest in real property.

> "The right to possess, to use and to enjoy land upon which an easement is claimed remains in the owner of the fee except insofar as the exercise of such right is inconsistent with the purpose and character of the easement . . . . An easement is a right which one person has to use the land of another for a specific purpose . . . . It is distinguished from the occupation and enjoyment of the land itself." *Etz v. Mamerow,* 72 Ariz. 228, 233 P.2d 442, 444 (1951).

But these esoterica of real property theory, interesting though they may be in the abstract, are of no moment here. Nothing in the governing statute suggests that Congress meant to apply any different rule to easements than to outright sales. It is, after all, the lands which are put in trust under this statute. By virtue of Sec. 28, of the Enabling Act, the lands may be "disposed of in whole *or in part* only" as provided in the statute. The provisions of the act run to both sales and leases. They cover "disposition of any of said lands, or of any money or *thing of value directly or indirectly* derived therefrom"; Sec. 28 reaches not merely sales but

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[15] "The right, being an easement, is a part of the realty itself, an interest in land, and is governed by the rules of law with reference to real property." *Miller v. Letzerich,* 121 Tex. 248, 49 S.W. 2d 404, 408 (1932). "An easement is a non-possessory interest in land" (citing Restatement of Property, p. 2903). *Beetschen v. Shell Pipe Line Corp.,* 363 Mo. 751, 253 S.W.2d 785, 786 (1952). "This easement is a real property right enforceable at law . . ." *Bihss v. Sabolis,* 322 Ill. 350, 153 N.E. 684, 685 (1926). "An easement, although an incorporeal right, is an interest in land." *Bakke v. Columbia Valley Lumber Co.,* 49 Wash. 2d 165, 298 P.2d 849, 852 (1956).

also any "other disposal." Moreover, the section provides that "every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, *or the use thereof*" not in conformity with the act shall be null and void. (R. 20). (Emphasis added). Any permit given the Highway Department for use of these lands is so clearly a "sale, lease, conveyance, or contract of or concerning" the lands, and certainly so concerns "the use thereof" as to make further argument unprofitable. The concern expressed by Congress that the public lands be protected for their proper use was so clearly expressed, for the purpose of dealing with every possible disposition of the land, that the argument is simply not available that rights of way were intended to be excluded from this most comprehensive statute.

III. *The Act Requires Payment of Money in Accordance with Its Terms.*

A. *The Statute and the Decisions of This and Other Courts Require Payment for Use of School Lands.*

The short answer to the decision below is that the trust lands were transferred by Congress to Arizona "in trust," "to be disposed of in whole or in part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions . . . ." (Sec. 28). Congress required Arizona to accept the trust as a condition of statehood, Sec. 20, Ninth, of the Enabling Act; Arizona did this in Article X of the state constitution.

The lands can thus be "disposed of in whole or in part only" as provided in the act. Any other disposition is a "breach of trust." Nothing in the act even remotely or theoretically authorizes the state to transfer trust lands to its highway department without compensation. Since the act permits "only" the dispositions authorized, and permits disposition only in "the manner" prescribed, this state donation to its Highway Department fails twice—both the

substance and the manner of the disposition are outside any statutory authorization of any kind.

The case is really that simple. The grants to the Highway Department are either authorized under the trust or they are not. Nothing even remotely purports to authorize them. They are, therefore, a "breach of trust."

The Enabling Act does not permit a share in the general prosperity thought to result from highways to be substituted for payment of the specific dollars required to go to school funds by the Arizona-New Mexico Enabling Act. On this fundamental matter of principle, the decision of the Arizona court conflicts squarely with the decision of this Court in *Ervien v. United States,* 251 U.S. 41, 40 Sup. Ct. 75, 64 L.Ed. 128 (1919). In *Ervien,* New Mexico had passed an act authorizing funds derived from the sale of public lands to be expended for advertising the resources and advantages of New Mexico. An action was brought under the identical Enabling Act here involved[16] to enjoin such expenditures on the grounds that the revenues from public lands could be used only for specific purposes and that it would be a breach of trust to use them for any other. The Court, in holding that the trust obligation was to be strictly construed, disposed of the matter briefly by approving of "the careful opinion of the Circuit Court of Appeals." This opinion, 246 Fed. 277 (8th Cir. 1917), reviewed the "advantage theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it, saying:

> "It would be but a step further to argue the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the state that are to be advertised, *such as systems of public highways,* irrigation, public schools, and the like." Id. at 280-81. (Emphasis added.)

Arizona has now taken that further step; it is using not just revenues but the trust lands themselves on this "advantage" theory

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[16] Act of June 20, 1910, ch. 310, 36 Stat. 557.

for systems of public highways. This concept was positively rejected in *Ervien.*[17] The Court there held that:

> "There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose; and to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should be deemed a breach of trust.'
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> "The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be, that the state might be tempted to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity." 251 U.S. at 47-48.

We are dealing with a trust in government lands and a grant for trust purposes. All such grants are strictly construed. *Caldwell v. United States,* 250 U.S. 14, 39 Sup. Ct. 397, 63 L.Ed. 816 (1919); *Slidell v. Grandjean,* 111 U.S. 412, 437, 4 Sup. Ct. 475, 28 L.Ed. 321 (1884); *Dubuque & Pac. R.R. v. Litchfield,* 64 U.S. (23 How.) 66, 16 L.Ed. 500 (1860). Hence, most other states dealing with analogous statutes have given them a very strict construction in favor of the clear requirement of payment. As has been noted, New Mexico, under the identical statute, has held that the State Highway Commission must compensate the school trust for rights-of-way and construction material; *State ex rel. State Highway Comm'n v. Walker,* 61 N.M. 374, 301 P.2d 317 (1956). North Dakota, in *State Highway Comm'n v. State,* 70

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[17] Not only did the court below take this further step, it did so without referring to the *Ervien* case in its opinion, although the case was referred to both in the briefs (R. 28, 29) and was specifically made the basis of the motion for rehearing and reconsideration. (R. 43-46, 50, 51, 54).

N.D. 673, 297 N.W. 194 (1941), has held that the State Highway Commission cannot take school lands without compensation for rights-of-way. See also the direct holding in *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910), that school lands could not be condemned for dam and reservoir purposes.[18]

Nebraska, in *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951), and *State ex rel. Johnson v. Central Nebraska Pub. Power & Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841 (1943), has established the general principle that the legislature is not authorized to make a grant of public school lands without compensation for the taking, regardless of whether the grant is in fee, as an easement, or by lease. The

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[18] Sec. 10 of the Montana Enabling Act, 25 Stat. 676 (1889) also granted lands "for the support of common schools," and Art. XVII, Sec. 1 of the Montana Constitution placed the lands in trust, to be disposed of only for the purposes for which they had been granted. Accordingly the attempted condemnation of school lands in the case of *State ex rel. Galen v. District Court* also was held to violate the contract between the state and the federal government; a writ of prohibition was issued to prevent further condemnation proceedings as to them. Given these constructions of the more general provisions of their enabling acts by the Montana and Nebraska courts, the conclusion is inescapable that the far more restrictive and detailed corresponding provisions of the Arizona act should be given at the very least a similarly restrictive interpretation. See also *State v. Fitzpatrick*, 5 Idaho 499, 51 Pac. 112 (1897), and *United States v. Fenton*, 27 F. Supp. 816 (D. Idaho 1939), where a similar enabling act and constitutional provisions were interpreted to prevent any dissipation of school funds or violation of the conditions of the trust. The Idaho Admission Bill, 26 Stat. 215 (1890), and Idaho Const. Art IX, sec 3, were held in *Fitzpatrick* to prevent the legislature from enacting a statute permitting forfeitures or penalties to be paid from trust funds, since under those provisions the fund must be kept "inviolate and intact." In *Fenton*, following *Fitzpatrick*, the court held that a state statute of limitations was ineffective to limit the right of the state to assert its mortgage rights in a condemnation action brought by the United States. It carefully distinguished the ability of the state to handle revenues belonging to it from the restrictions surrounding control of the common school fund, citing *Board of Comm'rs v. State ex rel. Comm'r of Land Office*, 125 Okla. 287, 257 Pac. 778 (1926).

Central Nebraska case held that under the terms of the Nebraska Enabling Act, 13 Stat. 47 (1864), and of the Nebraska Constitution of 1866, Art. VII, sec. 1, the state was under a contractual as well as a constitutional obligation to refrain from disposition or alienation of school lands except as there provided. Sec. 7 of the Nebraska Enabling Act provided that specified sections would be set aside "for the support of common schools," and its constitution had confirmed this trust. Therefore the school fund was entitled to damages for the unauthorized taking of lands for an irrigation canal. In the *Board of Educational Lands and Funds* case, a statute authorizing lease renewals in certain circumstances was held to violate the provisions of the Nebraska Constitution relating to the school trust, since it did not result in the most advantageous return to the trust. Thus Nebraska has clearly recognized that the use of an interest representing less than the fee, as well as the fee itself, without full compensation to the school trust, is prohibited.

B. *The Legislative History Confirms the Interpretation of the Statute.*

The legislative history of the statute shows beyond question that Congress meant strictly to protect the land from all invasions. The history of Arizona's bid for statehood is a tortuous one.[19] As previously stated, only the provisions of the final statehood bill contained the requirement that the public lands themselves be placed in trust. This plan originated in the Senate and became

[19] Between 1889 and the final successful statehood bill, thirty-nine bills and twelve joint resolutions were introduced in Congress regarding statehood for Arizona. Twenty-nine of these bills and nine of the resolutions died in committee. Three bills were reported favorably out of the Committee on Territories and four bills and one resolution passed the House of Representatives but failed to come to a vote in the Senate. One bill passed both houses of Congress but died from want of agreement concerning amendments not involving land grants. Another bill was passed as an enabling act for Arizona, but was rejected by the people of Arizona because of its terms — that Arizona was to be admitted along with New Mexico as one state.

a substitute for an earlier House proposal. But the earlier legislative history materials show that Congress was consistently concerned with limiting the state legislative powers of disposal of school lands.[20]

The Act that proved to be eventually successful was originally introduced in the 61st Congress as H.R. 18166. This bill contained a provision that the proceeds of the lands be placed in trust, as was the case with the 1909 act. Even here, concern was expressed that the state receive an adequate return for its lands. See H. R. Rep. No. 152, 61st Cong., 2d Sess. (1910).

When the bill reached the Senate, the Committee on the Territories substituted a measure which placed the lands themselves in trust; for the acceptance of the substitute by the House on June 18, 1910, Sec. 45 Cong. Rec. 8487, Senate Rep. No. 454, 61st Cong., 2d Sess. at 18 (1910), noted that the Senate Bill:

> "[E]xpressly declares that the lands granted and confirmed to the new states shall be held in trust, *to be disposed of only as therein provided and for the several objects specified.* The same trust feature is extended to the proceeds of the granted lands. Mortgages are entirely forbidden, and the sales and leases are required to be made to highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in a case of any lease for a period of five years or less." (Emphasis added.)

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[20] See Hearings before the House Committee on Territories, 60th Cong., 2d Sess., p. 13 (1909), where problems of graft in connection with school land sales were recognized, and a committee member called for exact specification of what was to be done with the lands. In the legislative history of other unsuccessful bills, there are scattered references to the problems of legislative control and disposition of public lands. See, *e.g.*, the debate on H.R. 12543, 57th Cong., 2d Sess., 36 Cong. Rec. 493 (1903) (remarks of Sen. Nelson); the debate on H.R. 14749, 58th Cong., 3d Sess., 39 Cong. Rec. 692-93 (1905); see H.R. 27891, Sec. 29, 60th Cong., 2d Sess. (1909), the text of which appears at 43 Cong. Rec. 2419 (1909), which provided for the proceeds of the permanent fund to be used only for the improvement, maintenance, and support of the respective educational institutions.

At page 20 of this report, the reason specifically given for placing the lands in trust was to prevent the recurrence of the circumstances leading to the "tall timber" cases in New Mexico.[21] The committee also referred to testimony from various representatives from Arizona at the time of the Senate hearings whose testimony was unanimous that the very careful restrictions that were placed about the disposition of the land were fully approved and supported by them.[22] And when the bill came to the floor of the Senate for discussion, the chairman of the Committee on the Territories again expressed concern that the lands be properly used, and stated that the amendment concerning disposition of the land was "the most important item in the Senate bill."[23]

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[21] See note 3, *supra.*

[22] At the time the House bill was considered in committee, a letter from former Secretary of Interior Garfield concerning the setting of minimum prices urged the necessity for curing the situation under which other states did not "derive the full benefit to which the schools are entitled." H.R. Rep. No. 152, 61st Cong., 2d Sess., p. 4 (1910). When an Arizona territorial delegate at the Senate Committee hearings was expressly interrogated as to whether he accepted on behalf of his state "the careful restrictions put about the disposition of lands" he outdid his questioner — "I believe the restrictions on such public lands cannot be made too broad." Hearings on S. 5916 before the Senate Committee on the Territories, 61st Cong., 2d Sess., p. 88 (1910).

[23] "The fourth difference, Mr. President, relates to disposal of the land which both bills appropriate for school purposes and other purposes. The House bill throws no safeguard whatever about the disposition of that land. I regard this as quite the most important item in the Senate bill.

"The Senate committee bill shows very carefully considered safeguards about its disposition. We took the position that the United States owned this land, and in creating these States we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes.

"So the Senate bill provides that there shall be no mortgages on the land; that it shall be sold and leased only after appraisement and advertisement; that the proceeds shall be kept in separate funds; and many other practical precautions which as a matter of mere business wisdom I think everybody agrees to. The Senate bill makes those lands and the proceeds thereof a trust fund.

(Footnote Continued)

The Senate Committee was fully aware of the seriousness of its actions. The conclusion of its report was:

> "Your committee can not too earnestly call attention to the extreme care that should be taken with every provision of a bill like this. It is the only legislation which Congress can pass that never can be amended, repealed, or modified in any way. A statehood bill once enacted is enacted forever without possibility of change. If a mistake is made it is beyond remedy. Every other law Congress can enact can be repealed, amended, modified—but not a statehood bill. Therefore every line of it should be wrought out with a painstaking care not required of any other form of legislation. Once passed, corrections of mistakes are impossible; once passed, it is beyond recall." S. Rep. No. 454, at 33-34.

The act must now be interpreted in the light of the gravity and intent with which it was adopted. As the committee said: "Once passed, corrections of mistakes are impossible; once passed, it is beyond recall."

C. *Subsequent Legislation Confirms This Interpretation of the Statute.*

"Of course that is not without precedent. We have thrown conditions around land grants in several States heretofore, notably in the case of Oklahoma, but not so thorough and complete as this. The reason why it was thought necessary to do this, outside of the general reasons which would support it as a matter of good business prudence, was the unfortunate experience that occurred in the Territory of New Mexico a few years ago, where the land grant of time of 1898 was, as the Department of Justice thought, after careful investigation, grossly and fraudulently violated.

"The result was that a great deal of that valuable timber was sold at an absurd sum, and the Government, after careful investigation, began suits which are now pending against corporations and parties, and the Territory itself has been made a party.

"I might say this further thing, Mr. President, that it is to my mind important, that every person who appeared before the Senate committee, as is shown by the Senate hearings, regardless of his politics, without a single exception, approved, and in many cases very emphatically approved, of the restriction which was thrown around the lands in those Territories by the Senate bill." Remarks of Sen. Beveridge, 45 Cong. Rec. 8227 (1910).

An enabling act is very serious legislation, but it is legislation; if Congress has discovered that it has been too rigid in some particular, it can amend the Act, and if the state accepts the amendment there may be a new agreement.

The New Mexico-Arizona Enabling Act has been amended at least seven times in respect to the land restriction provisions.[24] Most of these are irrelevant for purposes of the instant case except as reminders that Congress retains the power to act; the most recent (1951) amendment, for example, relates to mineral leases and has nothing to do with public uses; see Act of June 2, 1951, ch. 120, 65 Stat. 51. Thay are also relevant as demonstrating that the Enabling Act covers less than fee interests. See Act of June 5, 1936, ch. 517, 49 Stat. 1477; Act of June 2, 1951, ch. 120, 65 Stat. 51. The committee reports accompanying these amendments emphasize that the changes in the provisions regarding leases were made to overcome the restrictions, necessarily recognizing that the act operates to prevent, without specific authorization, conveyances of less than fee interests in the trust lands as well as conveyances of the fee. See H. R. Rep. 1103, 74th Cong., 1st Sess. (1935); S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H. R. Rep. No. 429, 82d Cong., 1st Sess. (1951).

The most important of the amendments, directly relating to the present case, is the Act of Aug. 24, 1935, ch. 648, 49 Stat. 798, permitting the "State of Arizona" to "transfer without cost to the town of Benson title to" a given section for "park purposes." Benson was only a village, and Rep. Isabella Greenway explained to the House of Representatives that it could not possibly afford even the minimum $3.00 per acre fee established by the Enabling Act. "Under the enabling act at that time," she told the House, "the State was authorized to transfer land at a

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[24]See Table, Appendix C, S. Rep. No. 194, 82d Cong., 1st Sess. p. 7 (1951); and Act of June 2, 1951, ch. 120, 65 Stat. 51.

cost of not less than $3 per acre. The State of Arizona wants at this time to give this 640 desert acres to the little town of Benson, which could not possibly pay $3 an acre for the purpose of park and recreation. The land is desert land, and it could not be used for any other purpose. The State wants to give it to the school (sic) for recreation and park purposes. The purpose of the bill is to enable them to do so without having to pay this $3 per acre." 79 Cong. Rec. 12525 (1935).[25]

How can it be said that the State can not give a section for a park without an amendment to the Enabling Act, but that it can give, as it has, 40,000 acres for highways and material sites? We appreciate that the views of a subsequent Congress as to the meaning of an earlier law are not conclusive, *Waterman S. S. Corp. v. United States,* 381 U.S. 252, 269, 85 Sup.Ct. 1389, 14 L.Ed. 2d 370 (1965); *United States v. Price,* 361 U.S. 304, 313, 80 Sup.Ct. 326, 4 L.Ed.2d 334 (1960); but the subsequent interpretation may have weight, *Federal Housing Administration v. Darlington, Inc.,* 358 U.S. 84, 79 Sup.Ct. 141, 3 L.Ed.2d 132 (1958), particularly when a group of statutes dealing with the same subject matter indicate a "harmonizing text," *United States v. Hutcheson,* 312 U.S. 219, 231, 61 Sup.Ct. 463, 85 L.Ed. 788 (1941).

We deal here with such a "harmonious text"—the entire statutory pattern of the land grants. A great, volume-laden predecessor of the New Mexico-Arizona statute was the North Dakota-South Dakota-Montana-Washington Act of Feb. 22, 1889, ch. 180, 25 Stat. 676. This act, which also contained grants for school lands and which provided (Sec. 11) that these lands could be

[25]The Department of Interior, in approving the bill to give the section to Benson, quoted extensively from Sec. 28 of the Enabling Act and said, "The purpose of the proposed legislation is to remove the restriction contained in the enabling act. In view of the public purpose for which the land is desired, and the comparatively small area involved, I have no objection to offer to the passage of said joint resolution." H. R. Rep. No. 1103, 74th Cong., 1st Sess. pp 1-2 (1935).

disposed of only by public sale, was construed in *State ex rel. Galen v. District Court,* 42 Mont. 105, 112 Pac. 706 (1910), as barring any acquisitions of school lands even by eminent domain —the lands could be put to public use *only* by an offering at public sale. As is developed more fully in the next section of this brief, the Montana opinion conflicted on this eminent domain question with an Idaho opinion interpreting its enabling act (Act of July 3, 1890, ch. 656, Sec. 5, 26 Stat. 215) the opposite way.

Faced with this problem, Congress adopted a general amendment to the Enabling Act for the four states, Act of Aug. 11, 1921, ch. 61, 42 Stat. 158, providing that those States "may, upon such terms as it may prescribe, grant such easements or rights in such lands as may be acquired in, to, or over the lands of private properties through proceedings in eminent domain."

The accompanying Committee reports show Congress scrupulously not taking a position on the *Galen* eminent domain issue, except to recognize the force of the decision. The Senate report quotes the relevant passage of the statute and says,

> "A strict, and perhaps an accurate, interpretation of the language quoted would forbid that any part of such lands could be appropriated for the purpose of a public road or devoted to any other public use or acquired for any public purpose except at a competitive sale. It is to remedy this state of affairs that the bill in its initial part authorizes the States, respectively, to grant easements and rights in the lands granted, under conditions which, if they were owned privately, would make them subject to appropriation under the law of eminent domain." S. Rep. No. 93, 67th Cong., 1st Sess., at 1-2 (1921).

The measure, as handled on the House floor by Representative Burtness of Montana, was presented as one to make it possible for a state "to convey lands for public purposes such as highways." He explained that the purpose was to permit easements to be given

for roads; and he stressed that this would be "upon such terms as the State may prescribe." 61 Cong. Rec. 4491 (1921).[26]

If the Arizona Supreme Court's position is sound, then certainly Congress has been passing land laws needlessly. If a state has a right to grant easements for roads or otherwise dispose of lands for public purposes without charge, then not only Arizona's Benson Act but also the 1921 four-state legislation was entirely unnecessary. We submit instead that the consistent Congressional pattern coincides with the statute itself; Arizona can not dispose of the trust lands except as authorized by the statute. When the town of Benson was given 640 acres to use as a park, the enabling act had to be amended; when lands were to be sold at their appraised value rather than a minimum figure, when the legislature was permitted to provide for the exchange of lands held by the states for private lands, when it was authorized to permit agricultural and mineral leases, and to permit the extension of time for which leases could be made, special congressional provisions were made. Yet, under the present Arizona practice, 40,000 acres of trust lands have been given for highway and material site purposes in the past 10 years without any amendment to the statute and without any payment to the trust. Such a practice is both incongruent with the original Enabling Act and with the purpose of that Act as reflected by subsequent congressional understanding of it.

IV. *The Arizona Land Commissioner's Regulation is Valid.*

The regulation of the Arizona Land Commissioner, which he

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[26]The 1921 Act was interpreted by a Senate Committee proposing a further (and irrelevant) amendment in 1932 thus:

"It was found necessary to modify the act so as to permit the granting of easements over the lands so granted for roads, telegraph, and telephone lines and easements generally such as may be acquired by the local eminent domain statutes. This was accomplished by the act approved August 11, 1921 (42 Stat. 158)." S. Rep. No. 139, 72d Cong., 1st Sess. (1932).

has been prohibited from enforcing by the decision of the court below, is as follows:

> "State and County highway Rights of Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122." Proposed Regulation of State Land Commissioner, Rule 12.

This regulation imports the Arizona eminent domain standards for determination of the value of the right of way and material sites that are granted. A.R.S. Sec. 12-1122 is part of Arizona eminent domain procedure.

The attack on this regulation for the reasons of the court below is, we have argued to this point in this brief, baseless. The Arizona Supreme Court's decision that the land should be given out on a no-charge basis is violative of the trust obligations imposed by the Enabling Act.

There remains one further question—whether the trust lands may be taken under the eminent domain power without public sale. Nothing in the New Mexico-Arizona Enabling Act expressly authorizes taking of trust land even by eminent domain. If we take the view of the Montana court in *State ex rel. Galen v. District Court,* 42 Mont. 105, 112 Pac. 706 (1910), then the trust lands can not be divested even by eminent domain procedures; road easements would have to be acquired by public sale, and Arizona and New Mexico would have to get some equivalent of the 1921 statute, discussed above, which the rationale of the *Galen* case made necessary for the four states to which it relates.

As we noted above, the Montana decision conflicted directly with an Idaho case of the same vintage, *Hollister v. State,* 9

Idaho 8, 71 Pac. 541 (1903). *Hollister* held that the eminent domain power was an inherent power of sovereignty, and that Congress could not have intended to create a sovereign and simultaneously deprive it of an essential of its sovereign being; hence it held trust lands subject to taking. Highly practical considerations point in the same direction; public sale of a borrow pit, of use only as it is close to a construction job, may well become a mockery, and while there will indeed be serious bidding for compact or contiguous lands, the public offer of an easement in a many-mile-long strip may draw poorly. Hence New Mexico, which has firmly held that the trust lands may be taken for road purposes only upon fair compensation, permits the use of eminent domain procedures and does not require public sale; *State ex rel. State Highway Comm'n v. Walker,* 61 N.M. 374, 301 P.2d 317, 322 (1956), holds that it "could not have been within the contemplation of Congress" to require public sales for right of way easements or material dumps.[27]

We think it would strain a point to contend that when Congress enacted the 1910 New Mexico-Arizona Enabling Act it had the 1903 Idaho decision in mind, although that was the only outstanding decision on the exact point; the Montana case was determined a few months after the New Mexico-Arizona act. But we do rely in part on the uniform executive practice in the many states with trust lands; see the examples given in the Statement of Facts in this brief. Moreover, the Idaho decision is sound; the eminent domain power is an element of sovereignty, of which

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[27]We are informed by the Commissioner of Public Lands of the State of New Mexico that "In those instances where the Highway Department in New Mexico wants to own the land without a reverter clause, such as some of its maintenance yards upon which it will construct permanent buildings, and also some roadside parks, it requests that the land be put up for sale and it bids it in as any private individual would do." Letter, General Counsel, New Mexico Commissioner of Public Lands, to Arizona Attorney General, July 5, 1966.

States do not divest themselves by contract. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 12 L.Ed. 535 (1848).[28]

The power of eminent domain is an inherent power of the state[29] that exists until it has been positively limited by a Constitutional provision or channeled by statute. Such provisions are not grants of power, but are only limitations on a power that would otherwise be absolute.[30] The power should not be deemed lost by implication. [31] By various statutes, the Arizona legislature has structured the power so as to permit the issuance of the Commissioner's Regulation now before the Court.

A.R.S. Sec. 37-441 provides that:

"The state may, when necessary for its uses or for the uses of any state department or institution, take over any state lands . . . and the department or institution so using the lands shall lease them and pay such rental as the state land department requires."

A.R.S. Sec. 37-461(A) provides that:

"The state land department may grant rights of way for any purpose it deems necessary . . . on and over state lands, subject to terms and conditions the department imposes. The depart-

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[28]For discussion see *Frank, Justice Daniel Dissenting*, 207-212 (Harv. Univ. Press, 1964).

[29]*E.g., James v. Dravo Contracting Co.*, 302 U.S. 134, 58 Sup.Ct. 208, 82 L.Ed. 155 (1937); *Georgia v. Chattanooga*, 264 U.S. 472, 44 Sup.Ct. 369, 68 L.Ed. 796 (1924); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43 Sup.Ct. 442, 67 L.Ed. 809 (1923).

[30]*City of Cincinnati v. Louisville & N.R.R.Co.*, 223 U.S. 390, 32 Sup.Ct. 267, 56 L.Ed. 481 (1912); *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1876); *Garrison v. New York*, 88 U.S. 196, 22 L.Ed. 612 (1875). The only limiting constitutional provisions applicable here are U.S. Constitution Amendment XIV, and Arizona Constitution, Art. 13, Sec. 7, both of which require that just compensation be made for the taking of lands for public use.

[31]*The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837); *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 54 N.E. 689 (1899); *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903); *Terrace Hotel Co. v. State*, 46 Misc. 2d 174, 259 N.Y.S.2d 553 (1965).

ment may make rules and regulations respecting the granting and maintenance of such rights of way and sites.

And A.R.S. Sec. 37-481 provides that:

"The state land department shall conserve, sell or otherwise administer the timber products, stone, gravel and other products and property upon lands belonging to the state under rules and regulations not in conflict with the enabling act and constitution. . . ."

These sections taken together provide authority for the state to exercise its power of eminent domain over state lands, and for the land department to promulgate regulations concerning the manner in which compensation is to be determined. Significantly, all three sections were originally enacted at the same time. Ariz. Laws, 1915, 2d Spec. Sess., ch. 5. They do not run afoul of the constitutional limitations on the eminent domain power because they provide a standard of just compensation (the department has promulgated a regulation incorporating the factors to be considered by a jury in computing compensation for private lands taken in fotmal eminent domain proceedings) and because there is an implicit requirement contained in A.R.S. Sec. 37-441 that the lands are necessarily taken. Under the above statutory pattern there has occurred the substantial equivalent of a formal eminent domain proceeding. Determinations of necessity of taking and of proper compensation have been made. The Commissioner has been obligated, under the statutes and his own regulation, to set the value of the right of way or material site taken at a reasonable price. Determinations of the necessity of the taking have been first made by the condemning agency and approved by the Governor. A.R.S. Sec. 37-442. The constitutional limitations on the power have thus been satisfied and the condemning agency is allowed to proceed.

We conclude that the trust lands are subject to eminent domain procedures, and that the Arizona regulation of the Land Commissioner is a valid application of those procedures.

Conclusion

Throughout the history of the development of the western United States, Congress has made continuing efforts to provide for the support of public education and other designated public purposes by the use of portions of the public lands and their proceeds. At the time the New Mexico-Arizona Enabling Act was adopted, Congress was particularly concerned that the trust lands themselves and their proceeds be held inviolate for these specifically enumerated purposes. The decisions of the other states having similar enabling act provisions show that respect has been given to this intent. But the policy of the Arizona Supreme Court, as established in its prior decisions, and reiterated most recently in the case now before this Court, disregards this clear congressional intent, with the result that future school children and other beneficiaries of the public lands trust may have the doubtful benefit of seeing the acreage intended to be preserved for them crisscrossed with highways and public utility lines without any compensation having been given to the trust for this taking. The effect of use for these purposes it to make the land itself utterly useless for any purpose other than public or utility transportation. Such a result, which would allow the taking without any contribution to the trust so carefully created, conflicts not only with the language of the Enabling Act itself, but with the most elementary concept of a fiduciary duty, and with the decisions of other states construing the New Mexico-Arizona and other similar enabling acts.

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

New Mexico-Arizona Enabling Act

Sec. 20. Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making of any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress.

Sec. 24. That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however,* that the area of such indemnity selections on account of any fractional

township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more: *And provided further,* that the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

Sec. 25. That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eight-

een hundred and three, which grants are hereby declared not to extend to the said State, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two) one million acres: *Provided,* that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State.

Sec. 26. That the schools, colleges, and universities provided for in this Act shall forever remain under the executive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Sec. 27. That five per centum of the proceeds of sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major

portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees

shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided,* that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided,* That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-

electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the con-

trary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

APPENDIX B

Arizona Constitution

Article X

Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or,

3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as

long thereafter as oil, gas or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement; and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production.

* * * *

Section 8. Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this State by the said Enabling Act, not made in substantial conformity with the provisions thereof, shall be null and void.

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